Petition

81-1884

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS,

No.

In the Supreme Court of the United States

October Term, 1981

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY, BUREAU OF VOCATIONAL REHABILITATION; JAMES BONNER, Assistant Director, Field Operations; ANTHONY RENZI, Regional Administrator; and JOHN NOLAN, District Administrator,

Petitioners

vs.

ANNA SULLIVAN

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LEROY S. ZIMMERMAN
Attorney General
ELISABETH S. SHUSTER
Deputy Attorney General
ALLEN C. WARSHAW
Deputy Attorney General
Chief, Civil Litigation
Attorneys for Petitioners

1641 Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in allowing an award of attorney's fees under Title VII of the Civil Rights Act of 1964 to a plaintiff who alleged unlawful employment discrimination and contemporaneously pursued both her contractual and statutory remedies when her relief was obtained solely in the contractual arbitration proceeding?

TABLE OF CONTENTS

	PAGE
Statement of Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions	2
Statement of the Case	4
Reasons for Granting the Writ:	
A. This case presents a question of great public importance	7
B. The decision of the Court of Appeals is clearly erroneous and in conflict with the applicable decisions of this court	9
Conclusion	15
APPENDIX:	
Memorandum, District Court	1a
Order	7a
Order, District Court	8a
Opinion, United States Court of Appeals for the Third Circuit	9a
Dissenting Opinion	30a
Judgment	37a

TABLE OF AUTHORITIES

CASES:

Alexander v. Gardner-Denver, 415 U.S. 36 (1974) 5, 7, 8, 9, 10, 11, 12, 14

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 11, 12, 13, 14

Barrentine v. Arkansas-Best Freight System, U.S. , 101 S.Ct. 1437 (1980) 10

Blow v. Lascaris, 523 F. Supp. 913 (N.D. N.Y. 1981) 12

Board of Regents v. Tomanio, 446 U.S. 478 (1980) 10

Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970) 7

Derheim v. Hennepin County Bureau of Social Services, 524 F. Supp. 1321 (D. Minn. 1981) 12

Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) 10, 11, 13, 14

Gateway Coal Co. v. United Mineworkers of America, 414 U.S. 368 (1974) 7

Great American Federal Savings and Loan Association v. Novotny, 442 U.S. 366 (1979) 10

New York Gaslight Club v. Carey, 447 U.S. 54 (1980) 5, 6, 12

Sullivan v. Bureau of Vocational Rehabilitation, 504 F. Supp. 582 (E.D. Pa. 1980) 1, 5, 12

Sullivan v. Commonwealth of Pennsylvania, F.2d (3d Cir. 1981) ..... passim

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 7, 8

Unger v. Consolidated Foods Corporation, 657 F.2d 909 (7th Cir. 1981) 12

United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960) 7

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 7

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 7

Vaca v. Sipes, 386 U.S. 171 (1967) 14

FEDERAL STATUTES:

28 U.S.C. §1254(1) 1

42 U.S.C. §1983 .....2, 4, 10

42 U.S.C. §1985(c) 10

42 U.S.C. §1988 2

42 U.S.C. §2000e .....i, 4, 6, 7, 8, 13, 14

42 U.S.C. §2000e-5(k) 3, 6

OTHER AUTHORITIES:

Administrative Office of U.S. Courts, Annual Report of the Director 56 (1981) 8

110 Cong. Rec. 7205, 7207, 7214, 7217 and 13650-13652 (1964) 11

Director, Administrative Office of the U.S. Courts, Civil and Trials Statistical Tables Twelve Month Periods Ending June 30, 1970-79 at 2 (1980) 8

H.R. 9247, 92d Cong. 1st Sess. (1971) 11

H.R. Rep. No. 92-238 (1971) 11

S. Rep. No. 92-415, p. 24 (1971) 11

OPINIONS BELOW

The majority and dissenting opinions of the Third Circuit are unreported. They are set out in the Appendix at 9a-36a. The opinion of the District Court is reported at 504 F. Supp. 582 (E.D. Pa. 1980) and is also set out in the Appendix at 1a. The District Court's Order dismissing plaintiff's suit has not been reported and is set out in the Appendix at 8a.

STATEMENT OF JURISDICTION

The Court of Appeals filed its decision on October 26, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

United States Statutes:

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. §2000e-5 (k) :

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

Plaintiff is a female employee of the Pennsylvania Department of Labor and Industry, Bureau of Vocational Rehabilitation (hereinafter "BVR"). In April of 1977, she filed a grievance alleging that the selection for promotion of a male, rather than herself, violated the non-discrimination clause and the management rights clause of the applicable collective bargaining agreement.

In June of 1977, two months after she filed her union grievance, plaintiff filed a charge of sex discrimination with EEOC on the same ground as her union grievance. After receiving a notice of right to sue, plaintiff brought a timely action in federal court on November 21, 1978 alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, (hereinafter "Title VII"), and 42 U.S.C. §1983 (hereinafter "Section 1983").

A hearing on the grievance was held before an Arbitrator on May 24 and August 3, 1979 and in February of 1980 the arbitrator entered an award in Sullivan's favor. The relief that plaintiff received through that award was the same as the relief that she was seeking in her federal suit under Title VII and Section 1983. Plaintiff was represented in the arbitration proceeding by an attorney provided by her union. However, the District Court found that, in preparing the arbitration hearing, the union's attorney had received substantial aid from the private counsel who was representing plaintiff in her federal action.

In the Spring of 1980, the union filed a charge of unfair labor practices on Ms. Sullivan's behalf to enforce the

arbitration award. After a hearing, which resulted in a decision for plaintiff, BVR awarded plaintiff the back pay and retroactive seniority that she sought.

After receiving, through arbitration, all of the relief that she had sought from both her arbitration proceeding and her federal suit, plaintiff filed a motion for partial summary judgment on entitlement to attorney's fees in the federal district court. In that motion, plaintiff conceded that her case was moot except for the issue of attorney's fees. In response, defendants filed their motion for summary judgment for suggestion of mootness and response to plaintiff's motion for partial summary judgment on entitlement to attorney's fees.

The District Court denied plaintiff's motion for attorney's fees and subsequently dismissed her case because it found that the arbitration in which she prevailed was not an "action or proceeding under Title VII",[1] In doing so, the court relied on *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974), in which this Court emphasized the distinctly separate nature of the arbitration-contractual and Title VII-statutory remedies. The District Court read that case in light of this Court's "great emphasis", in *New York Gaslight Club v. Carey,* 447 U.S. 54 (1980), on the need for the administrative enforcement mechanism to be formally "an integral part of vindication of the Title VII claim."[2]

The Third Circuit, per Judge Garth, with Judge Adams dissenting, vacated the District Court's decision. In doing so, the majority held that attorney's fees are not limited to situations in which a plaintiff prevails by a judgment

---

[1] *Sullivan v. Bureau of Vocational Rehabilitation,* 504 F. Supp. 582, 585 (E.D. Pa. 1980) (4a).

[2] 504 F. Supp. at 584, (5a).

in a Title VII action itself, but "are available whenever a civil rights cause of action ultimately results in the plaintiff's having obtained relief, even when there are several links in the chain of events connecting the claim brought and the relief granted" (18a). Thus, according to the majority, where the plaintiff's case acts as a "catalyst" for the vindication of her constitutional rights, she is entitled to attorney's fees (19a). In this case, the majority found that there was a causal link between the efforts of plaintiff's counsel in the Title VII proceedings and the successful resolution of plaintiff's claim and, therefore, that she was entitled to attorney's fees.

Judge Adams dissented on the grounds that "the relief was granted not in an action or proceeding under Title VII but rather in an arbitration proceeding conducted pursuant to a collective bargaining agreement, not pursuant to the statute" (30a),[3] that the causal link, relied upon by the majority "is simply too attenuated to warrant a holding, by this Court, that Sullivan prevailed in an 'action or proceeding under [Title VII],' and that §706(k) [of Title VII] is an *exception* to the general 'American' rule that each party pay its own attorney's fee." (34a).

It is from the Third Circuit's decision that the defendants, hereinafter referred to as petitioners, seek a writ of certiorari.

---

[3] Judge Adams based this argument on the language in §706(k), 42 U.S.C. §2000e-5(k), and *Gaslight, supra. Id.* at (31a) (emphasis in original).

REASONS FOR GRANTING THE WRIT

A. This Case Presents a Question of Great Public Importance

The court below, in a novel interpretation, decided an important statutory issue which will have a far-reaching impact on the federal courts. By extending the award of attorney's fees under Section 706(k) of Title VII and under Section 1988 to a party who prevails in an arbitration proceeding, the court's decision not only goes far beyond the language of the statutes and the legislative intent,[4] but also encourages unnecessary federal litigation and ignores the strong federal policy favoring arbitration of labor disputes.

In *Alexander v. Gardner-Denver, supra,* this Court reiterated "the federal policy favoring arbitration of labor disputes as enunciated . . . in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), and the *Steelworkers*[5] trilogy. *See also Boys Markets v. Retail Clerks Union,* 398 U.S. 235 (1970); *Gateway Coal Co. v. United Mineworkers of America,* 414 U.S. 368 (1974)." 415 U.S. at 46-47. It is a policy which is "firmly grounded in congressional command."[6] The purpose of this policy is to promote in-

---

[4] See Argument B, *infra.*

[5] *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960).

[6] *Gateway Coal Co. v. United Mineworkers of America,* 414 U.S. at 377.

dustrial peace, and the grievance arbitration provision of a collective bargaining agreement is a major factor in achieving this goal.[7]

As this Court noted in *Gardner-Denver,* one of the main advantages of arbitration for the employer is that "the grievance-arbitration machinery of the collective bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices, . . . thus saving the employer the expense and aggravation associated with a lawsuit." 415 U.S., at 55. This incentive is largely removed by the Third Circuit's decision. One of the main expenses for an employer in a Title VII action is the award of attorney's fees to a successful plaintiff. If attorney's fees are awarded in an arbitration proceeding, that proceeding will no longer be inexpensive. Thus, contrary to the well established federal policy in favor of arbitration, the Third Circuit's decision to allow attorney's fees for the grievance arbitration proceeding discourages employers from entering into arbitration agreements involving claims of discriminatory employment practices.

Moreover, even without the additional cases which the Third Circuit decision invites, the number of cases filed in the district courts have been increasing at an alarming rate. Civil actions filed in the district courts increased from 87,321 in 1970 to 180,576 for the year ending June 30, 1981.[8] Coupling the federal policy promoting arbitration

---

[7] *Alexander v. Gardner-Denver,* 415 U.S. at 46, n. 6 citing *Textile Workers Union v. Lincoln Mills, supra.*

[8] Director, Administrative Office of the U. S. Courts, Civil and Trials Statistical Tables Twelve Month Periods Ending June 30, 1970-1979 at 2 (1980); Administrative Office of U. S. Courts, Annual Report of the Director 56 (1981).

with the decision in this case results in a staggering impact on the federal courts. As Judge Adams so succinctly described the consequences of the majority's decision in his dissent:

> [T]he result advocated by the majority is fraught with an even more disturbing implication: the burgeoning of unnecessary litigation in the federal courts. Because of today's ruling, employees aggrieved by discriminatory practices may well file Title VII claims as an adjunct to already-initiated arbitration proceedings simply to ensure the eventual award of a counsel fee.

(35a).

Accordingly, this case involves an issue of great public importance. This Court should grant review.

B. The Decision of the Court of Appeals Is Clearly Erroneous and in Conflict With the Applicable Decisions of This Court

The Third Circuit erred in allowing plaintiff to recover attorney's fees under federal statutes when her relief was obtained under the contractual arbitration proceeding.

In *Alexander v. Gardner-Denver, supra,* this Court made it very clear that arbitration and Title VII suits are separate, distinct and entirely unrelated remedies:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The

> distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.

415 U.S. at 49-50. The Court then went on to say that "[b]oth rights have legally independant origins . . ,"[9] that "in instituting an action under Title VII, the employee is . . . asserting a statutory right independent of the arbitration process."[10]

Relying in large part on *Gardner-Denver,* this Court has continued to hold that statutory and contractual rights are independent of each other and one cannot be used as the basis for an action under the other. *Barrentine v. Arkansas—Best Freight System,* U.S. , 101 S.Ct. 1437, 1443 (1980) (rights under the Fair Labor Standards Act are statutory rights independent of rights under a collective bargaining agreement); *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976) (filing of grievance pursuant to a collective bargaining agreement does not toll the statute of limitations for filing a charge with EEOC).[11] As this Court stated in *Electrical Workers v. Robbins & Myers, Inc.*:

---

[9] 415 U.S. at 52.

[10] 415 U.S. at 54.

[11] This Court has even taken the principle one step further and has refused to allow deprivations of a right under one statute to serve as the basis for a cause of action under another statute, again citing *Gardner-Denver* as authority. *Board of Regents v. Tomanio,* 446 U.S. 478 (1980) (must apply law governing New York statute of limitations to federal suit alleging violations of Section 1983); *Great American Federal Savings and Loan Association v. Novotny,* 442 U.S. 366 (1979) (deprivation of a right under Title VII cannot be the basis for a cause of action under 42 U.S.C. §1985(c)).

> In reaffirming the independence of Title VII remedies from other remedies, we noted that such independence might occasionally be a two-edged sword,[9] but 'in the face of congressional emphasis upon the existence and independence of the two remedies,' we were disinclined 'to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted,' 421 U.S., at 461.
>
> [9] '. . . these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one.' [*Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 261 (1975)].

429 U.S. at 237. "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander v. Gardner-Denver*, 415 U.S. at 48-49. "We [the Supreme Court] felt that the legislative history was quite clear in this respect, see, *e.g.*, 110 Cong. Rec. 7205, 13650-13652 (1964); H.R. 9247, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 92-238 (1971); S. Rep. No. 92-415, p. 24 (1971)." 429 U.S. at 236 n. 8.

See also 110 Cong. Rec. 7207, 7214 and 7217 (1964). Thus, the Third Circuit's decision to consider a plaintiff who has obtained full relief through a contractual arbitration proceeding to be a prevailing party in her Title VII suit and to award her attorney's fees as the "prevailing party" in that suit flies in the face of the clear congressional intent that the two remedies available to that plaintiff be wholly independent.

In this regard, the fact that respondent would lose her right to attorney's fees is irrelevant under our theory. Admittedly, under that theory, by choosing to pursue and vindicate her rights under her contractual remedy plaintiff would lose her chance to recover attorney's fees. However, she gains the advantages of arbitration, including, in this case, free representation in that process by the union. As this Court stated in *Gardner-Denver*, "the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices." 415 U.S. at 55. The choice is indeed a valuable one.[12]

Furthermore, denying plaintiff attorney's fees would not be contrary to the general policy, but rather, would be consistent with the "American Rule" which states that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."[13]

In upholding the "American Rule" in *Alyeska*, this Court considered the civil rights statutes and the impor-

---

[12] It is the existence of choice that distinguishes this case from the proceedings in *Gaslight, supra.* In *Gaslight*, this Court specifically held that the state administrative proceeding for which attorney's fees were awarded was a proceeding which the complainant was required to pursue under the provisions of Title VII. 447 U.S. at 60-66 and 71. As the District Court aptly put it in this case, the "administrative/judicial adjudicatory process [in *Gaslight*] is part and parcel of an action or proceeding under Title VII." 504 F. Supp. at 584 (5a). *See*: *Unger v. Consolidated Foods Corporation*, 657 F.2d 909, 920 (7th Cir. 1981); *Derheim v. Hennepin County Bureau of Social Services*, 524 F. Supp. 1321 (D. Minn. 1981); *Blow v. Lascaris*, 523 F. Supp. 913 (N.D.N.Y. 1981).

[13] *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

tance of attorney's fees in their enforcement, but concluded that:

> [C]ongressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

421 U.S., at 263. It is precisely such a judicial jettisoning of the "American Rule" that plaintiff would have this Court make.[14]

Beyond the violation to the "American Rule," allowing attorney's fees in Title VII suits to a party who prevails in a contemporaneous arbitration hearing would place employers at an onerous disadvantage. As this Court noted in *Electrical Workers v. Robbins & Myers, Inc., supra.* "Adherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII, see §706(b). The grievance procedure assures

---

[14] In his dissent, Judge Adams showed that he understood how far the majority had strayed from this principle:

> The Supreme Court has admonished us several times in the last several years to use the specific language in statutes enacted by the Congress when such language is, as here, clear on its face. And in *Alyeska Pipeline [Service Co. v. Wilderness Society,* 421 U.S. 240 (1975)], the Court expressly declared that it is the responsibility of Congress, not of the courts, to expand the availability of attorney's fee awards. From my perspective, the majority today has not simply interpreted a statute; it has rewritten the law.

(35a-36a).

no such comparable notice."[15] Similarly, the grievance procedure would not assure that the employer is notified that the union is receiving assistance from the private counsel retained by a plaintiff to pursue a contemporaneous Title VII suit in federal court. The employer's first notice could well be when it is served with private counsel's petition for attorney's fees.

Finally, many of the problems that plaintiff faced (and, accordingly, much of the attorney's fees that she accrued) could have been avoided if the union had met its duty to provide free, fair and adequate representation for its members who pursue the grievance-arbitration procedure.[16] If the union is incapable of handling the grievance arbitration proceeding when discrimination is alleged, either because of a conflict of interest or because of a lack of competent union counsel, it should provide for outside counsel. Title VII is not a vehicle by which the employer can be compelled to pay for the union's inability or unwillingness to meet its obligations.

In rendering a decision which carries with it the "disturbing implication [of] the burgeoning of unnecessary litigation in the federal courts,"[17] the Third Circuit held contrary to this Court's holdings in *Alexander v. Gardner-Denver, supra, Electrical Workers v. Robbins & Myers, Inc., supra,* and *Alyeska Pipeline Service Co. v. Wilderness Society, supra.* This holding is clearly erroneous and should therefore be reviewed by this Court.

---

[15] 429 U.S. at 240, n. 14.

[16] *Vaca v. Sipes,* 386 U.S. 171 (1967).

[17] (35a) (Adams, J. dissenting).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

LEROY S. ZIMMERMAN
Attorney General

By: ELISABETH S. SHUSTER
Deputy Attorney General

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Civil Litigation
Attorneys for Petitioners

Office of Attorney General
1641 Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Appendix

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-3927

ANNA SULLIVAN

v.

BUREAU OF VOCATIONAL REHABILITATION

MEMORANDUM

POLLAK, J., December 24, 1980

In March of 1977, one John Quinn was promoted to a post (psychological services associate II) in the Pennsylvania Bureau of Vocational Rehabilitation for which Anna Sullivan was also a candidate. Sullivan felt that she was better qualified for promotion than Quinn and hence that Quinn's selection discriminated against her on grounds of gender. She asked her union to file a grievance on her behalf pursuant to the non-discrimination clause of the collective bargaining agreement. The grievance was filed in April of 1977. Two months later, Sullivan, through privately retained counsel, filed a charge of gender discrimination with the Equal Employment Opportunity Commis-

sion (EEOC). In the ensuing months, the grievance process and the EEOC inquiry both went forward. Sullivan's counsel's efforts appear to have been a substantial catalyst with respect to the EEOC inquiry, assisting the federal agency in uncovering substantial pertinent information.

On June 30, 1978, District Director Hadfield of the EEOC issued his "Determination"—a three-page opinion which concluded that "there is reasonable cause to believe that the respondent [Pennsylvania Bureau of Vocational Rehabilitation] has engaged in an unlawful employment practice (Section 704(a)) within the meaning of Title VII." The District Director's favorable "Determination" served as a prod to the Pennsylvania Social Services Union (PSSU) to carry Sullivan's grievance forward to arbitration. The arbitral hearing took two days in the spring and summer of 1979. The presentation of Sullivan's case to the arbitrator was handled by counsel for the PSSU, but that presentation was based in major part on (1) the information developed by Sullivan's retained counsel during the EEOC phase; (2) the discovery pursued by retained counsel subsequent to the filing in this court of Sullivan's Title VII claim in November 1978; and (3) retained counsel's extensive pre-arbitral hearing collaboration with counsel for the PSSU.

In February, 1980, the arbitrator sustained Sullivan's grievance, concluding that Sullivan "was denied a promotion on the basis of her sex" and directing that Sullivan "shall be reclassified as a psychological services associate II as of at least one day previous to the day Mr. Quinn was, with all appropriate back pay, educational benefits and licensing opportunities that accompany the position." (Page 5)

The award of the arbitrator, now final, has resolved in Sullivan's favor all the claims advanced by her in this Title VII proceeding save one: The one claim not met is the subject of the motion for partial summary judgment now to be ruled on. That claim is for counsel fees covering the work done by retained counsel to advance the EEOC inquiry, the arbitration, and the Title VII case in this court. The claim rests on the following language in Section 706 (k) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5 (k):

> In any action or proceeding under this title [Title VII], the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs.

The arbitrator's award was a comprehensive adjudication of Sullivan's employment status in her favor. That is to say, she was, in that arbitral proceeding, "the prevailing party," to follow the language of Section 706 (k). The further question—the question which is decisive of the pending application for counsel fees—is whether the arbitration in which Sullivan prevailed was an "action or proceeding under this Title" (Title VII).

Sullivan argues two propositions which are uncontestable: the first is that the arbitrator's award was in furtherance of Title VII's objectives. The second is that the Supreme Court, in its construction of Title VII, was at pains, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), to promote the pursuit of arbitration as a complementary enforcement mechanism which, without prejudice to a Title VII claimant's rights,[1] might frequently lead to

---

[1] The Court in *Gardner-Denver* rejected the argument that pursuit of arbitration constituted an election of remedies fatal to a Title VII claim. The Court concluded (415 U.S. at 59-60):

the vindication of the rights with an expedition not often available in judicial proceedings.

While these two propositions are uncontestable, they do not of their own force yield the conclusion that an arbitration successfully pursued is an "action or proceeding under" Title VII. In reversing the lower courts' conclusion that one who pursued arbitration and lost was precluded from prosecuting her/his Title VII claim in a federal court, the Court in *Gardner-Denver* emphasized the separateness of the remedies involved:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.

415 U.S. at 49-50.

The fact that these separate remedies are mutually supportive does not, in my view, mean that they may be combined into a single "action or proceeding under this

---

> . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate. [The Court's footnote 21 is omitted.]

Title" within the contemplation of Section 706(k). The Supreme Court's recent teaching in *New York Gaslight Club, Inc. v. Carey*, 100 S.Ct. 2024 (1980), precludes such a result. In that case, the Court of Appeals for the Second Circuit had held, by divided vote, that a Title VII claimant was entitled to counsel fees where the successful adjudicatory process was conducted in the New York State Division of Human Rights and, on review thereof, in the courts of New York. The Supreme Court sustained the judgment of the Second Circuit, notwithstanding that the favorable adjudication on the merits in the state administrative agency and the state courts left nothing for the federal court to do except rule on the application for counsel fees. But the reason that *Gaslight Club* is an authority adverse, rather than favorable, to Sullivan is that Mr. Justice Blackmun's opinion for the Court places great emphasis on the fact that the New York administrative and judicial proceedings were—not just functionally, but formally as well—an integral part of vindication of the Title VII claim. As Mr. Justice Blackmun's opinion carefully explains, Title VII requires exhaustion of state anti-discrimination mechanisms as a predicate to the pursuit of federal enforcement mechanisms where the state processes are deemed adequate to vindicate Title VII's objectives. See 100 S.Ct. at 2031; *cf. Love v. Pullman Co.*, 404 U.S. 522 (1972). Since New York's anti-discrimination mechanisms meet federal standards, New York's administrative/judicial adjudicatory process is part and parcel of an "action or proceeding" under Title VII.

That the integration of state and federal mechanisms is central to *Gaslight Club* is apparent from the very first sentence of Mr. Justice Blackmun's opinion (100 S.Ct. at 2027):

> This case presents the question whether, under Title VII of the Civil Rights Act of 1964, a federal court may allow the prevailing party attorney's fees for legal services performed in prosecuting an employment discrimination claim in state administrative and judicial proceedings that Title VII requires federal claimants to invoke.

And confirmation is found in Mr. Justice Stevens' concurring opinion (100 S.Ct. at 2035):

> All that needs to be decided is whether an allowance of fees may properly cover the work performed in the administrative proceedings that were a prerequisite to the court action. I agree with the Court's disposition of that issue. . . .

The arbitration in which Sullivan prevailed was an enforcement mechanism additional to, not a predicate of, Title VII enforcement and hence was not an "action or proceeding under" Title VII. Wherefore, in an order filed this day, Sullivan's motion for partial summary judgment is DENIED.

(s) Louis H. Pollak
Louis H. Pollak

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-3927

ANNA SULLIVAN

v.

BUREAU OF VOCATIONAL REHABILITATION

ORDER

For the reasons given in the memorandum filed today, plaintiff Sullivan's motion for partial summary judgment is DENIED.

(s) Louis H. Pollak
Louis H. Pollak

December 24, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 78-3927

ANNA SULLIVAN

v.

BUREAU OF VOCATIONAL REHABILITATION

ORDER

The Memorandum and Order of December 24, 1980 having disposed of the only issues remaining before this Court, it is hereby

ORDERED that the Complaint is DISMISSED.

(s) Louis H. Pollak
Louis H. Pollak

Entered: 1/7/80
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1250

ANNA SULLIVAN,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, BUREAU OF VOCATIONAL REHABILITATION; JAMES BONNER, Assistant Director, Field Operations; ANTHONY RENZI, Regional Administrator; and JOHN NOLAN, District Administrator,

Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania

(Civil Action No. 78-3927)

Argued September 17, 1981

Before: Seitz, *Chief Judge,*

Adams and Garth, *Circuit Judges*

(Opinion Filed October 26, 1981)

Alice W. Ballard (Argued)
Samuel, Ballard & Hyman
4013 Chestnut Street
Philadelphia, Pennsylvania 19143
Attorneys for Appellant

Leroy D. Clark
General Counsel
Philip B. Sklover
Acting Associate General Counsel
Vincent Blackwood
Assistant General Counsel
William Ng
Justine S. Lisser (Argued)
Attorneys
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506
Attorneys for the Equal Employment Opportunity Commission, Amicus Curiae

Jack Greenberg
Charles Stephen Ralston
James S. Liebman
10 Columbus Circle—Suite 2030
New York, New York 10019
Attorneys for the NAACP Legal Defense and Educational Fund, Inc., Amicus Curiae

David Wilderman
Pennsylvania Social Services Union
Local 668 SEIU, AFL-CIO
1037 Maclay Street
Harrisburg, Pennsylvania 17103
Attorney for Pennsylvania Social Services Union, Local 668 SEIU, AFL-CIO, Amicus Curiae

Elisabeth S. Shuster (Argued)
Deputy Attorney General
Allen C. Warshaw
Deputy Attorney General,
Chief, Civil Litigation

LeRoy S. Zimmerman
Attorney General
Office of Attorney General
1641 Strawberry Square
Harrisburg, Pennsylvania 17120
Attorneys for Appellees

Richard S. Gebelein
Attorney General of Delaware
Regina Mullen Small
State Solicitor
Department of Justice
State Office Building
820 N. French Street
Wilmington, Delaware 19801

Charles A. Graddick
Attorney General of Alabama
State Administration Building
Montgomery, Alabama 36130

Wilson L. Condon
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811

John Steven Clark
Attorney General of Arkansas
Justice Building
Little Rock, Arkansas 72201

Carl R. Ajello
Attorney General of Connecticut
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115

Tany S. Hong
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

Warren R. Spannaus
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155

Steven Freudenthal
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
Attorneys for States of Delaware, Alabama, Alaska, Arkansas, Connecticut, Hawaii, Indiana, Minnesota and Wyoming,
Amici Curiae

OPINION OF THE COURT

GARTH, *Circuit Judge.*

This appeal requires us to decide whether a plaintiff, whose counsel's efforts in prosecuting her Title VII suit were a material factor in her ultimately obtaining the relief sought not in the Title VII action itself, but in an arbitration proceeding, may be awarded attorneys' fees restricted to the Title VII efforts of her counsel.[1] We hold that the district court erred in refusing to authorize attorneys' fees in these circumstances.

I.

In March, 1977, Anna Sullivan, a Rehabilitation Counselor I in the Bureau of Vocational Rehabilitation (BVR) of the Commonwealth of Pennsylvania's Department of Labor and Industry, was passed over for promotion to the position of Psychological Services Associate II in favor of a male co-worker. The next month, Sullivan, believing that she had been discriminated against on the basis of her sex, asked her union, Pennsylvania Social Services Union Local 668, SEIU (the "union"), to file a grievance on her behalf pursuant to the nondiscrimination clause of its collective bargaining agreement with BVR. Two months later, in June, 1977, Sullivan, through privately retained counsel, filed a charge of sex discrimination

---

[1] Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k), provides:

> In any action or proceeding under [Title VII] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. . . .

with the United States Equal Employment Opportunity Commission (EEOC) pursuant to section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(b).

During the spring of 1977, the union processed Sullivan's grievance through various stages of the contractual grievance process without success. The union was uncertain as to the strength of Sullivan's grievance because it was unable to obtain from BVR a specific statement of the criteria the Bureau had used in making its promotion decision. When, in July, 1977, the union received a final denial of the grievance from BVR, it ceased activity on the grievance pending the outcome of the EEOC proceedings. App. at 16.

In the meantime, the efforts of Sullivan's retained counsel spurred on the EEOC inquiry. Her counsel assisted the EEOC in uncovering substantial pertinent information. *See Sullivan v. Bureau of Vocational Rehabilitation,* 504 F. Supp. 582, 583 (E.D. Pa. 1980). On June 30, 1978, the EEOC concluded that there was reasonable cause to believe that BVR had engaged in an unlawful employment practice under Title VII.

The EEOC's determination "served as a prod to the [union] to carry Sullivan's gievance forward to arbitration." *Id.* at 583. In December, 1978, the union filed a demand for arbitration of Sullivan's grievance. As the union's counsel stated in an affidavit filed in the instant proceeding, which action seeks only attorneys' fees:

> Ms. Sullivan's case appeared to be meritorious, in large part because of the work performed by [her counsel] during the investigation of Ms. Sullivan's

> EEOC charge, and because of the EEOC's determination in Ms. Sullivan's favor. Had it not been for [Sullivan's counsel's] development of the record during the EEOC investigation, the Union might well have overlooked the meritorious aspect of the case. . . . However, the development of the case at the EEOC level pointed out to the Union that there was a strong claim of sex discrimination. . . .

App. at 12.

Meanwhile, on November 21, 1978, after receipt of a notice of right to sue, Sullivan commenced the instant action under Title VII and 42 U.S.C. §1983. During the fall and winter of 1978-79, Sullivan's counsel proceeded with discovery and case preparation in the Title VII action. As a result of her discovery requests, Sullivan's counsel obtained BVR employment records that demonstrated that Sullivan's performance evaluations were superior to those of the male co-worker who was promoted ahead of her. Using these documents and the materials from Sullivan's EEOC file, Sullivan's counsel prepared a case outline detailing each of the claims in the case, and setting out the manner in which she planned to prove the facts supporting each element. In April, 1979, she met with the union's counsel to make this work product available to him as he prepared for Sullivan's arbitration hearing. App. at 27. In addition, since the same witnesses Sullivan's counsel planned to depose in connection with the Title VII action were scheduled to testify in the upcoming arbitration proceeding, Sullivan's counsel, in lieu of taking depositions in the federal suit, worked with the union's counsel to prepare questions for use in examining and cross-examining these witnesses at the arbitration. *Id.* at 27-28.

The arbitration hearing on Sullivan's grievance was held on May 24 and August 3, 1979. The union's counsel acknowledged that "[m]any of [the] documents [used in the arbitration] would not have been immediately available to the Union but for the EEOC investigation and the discovery in the federal civil rights action," and noted that investigative and discovery work by Sullivan's counsel proved invaluable in preparing for the arbitration. *Id.* at 13. The union's counsel, in examining and cross-examining witnesses at the arbitration, worked directly from the list of questions developed in collaboration with Sullivan's counsel. *Id.* at 13-14.[2]

In February, 1980, the arbitrator sustained Sullivan's grievance, concluding that she had been denied a promotion on the basis of her sex, and ordered that she be retroactively promoted with backpay and associated benefits. The union thereupon filed a petition with the Pennsylvania Labor Relations Board to enforce the arbitral award.

The arbitrator's award granted Sullivan all the relief she had sought in her Title VII suit except attorneys' fees. Thereafter, she moved in the district court, where her Title

---

[2] As the district court noted:

> The presentation of Sullivan's case to the arbitrator was handled by counsel for the [union], but that presentation was based in major part on (1) the information developed by Sullivan's retained counsel during the EEOC phase; (2) the discovery pursued by retained counsel subsequent to the filing in [the district] court of Sullivan's Title VII claim . . . ; and (3) retained counsel's extensive pre-arbitral hearing collaboration with counsel for the [union].

504 F. Supp. at 583. These observations made by the district court are consistent with the union affidavits that we have quoted. BVR's affidavits do not contradict the union's affidavits or these claims.

VII action was pending, for partial summary judgment[3] seeking such fees under section 706(k) of Title VII. Sullivan sought attorneys' fees for work done in connection with the EEOC proceedings and the Title VII litigation in federal court, not for work done in connection with the arbitration itself.

The district court denied her motion on December 24, 1980. The district court noted that in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), the Supreme Court held that attorneys' fees could be recovered under section 706(k) for work done in state administrative and judicial proceedings that were a statutory prerequisite to Title VII relief in federal court. From this, the district court reasoned that because the arbitration in which Sullivan prevailed was an enforcement mechanism additional to, and not required by, Title VII's enforcement scheme, it was not an "action or proceeding under" Title VII within the meaning of section 706(k), and hence attorneys' fees under that section were not available. 504 F. Supp. at 584-85. Because Sullivan had obtained all the other relief she had sought in her suit from the arbitrator, on January 6, 1981, the district court dismissed Sullivan's entire complaint as moot.

II.

The Supreme Court, this court, and other courts of appeals have given section 706(k) a liberal reading, in one with Congress' intent to facilitate the bringing of discrimination complaints. *See Carey, supra*, 447 U.S. at 63.[4] In

---

[3] Sullivan's motion was styled as one for partial summary judgment because she sought only attorneys' fees, all other issues having been mooted by the arbitral award.

[4] As the Supreme Court noted in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980), "Because Congress has cast

particular, the courts have stressed that an award of attorneys' fees under section 706(k) and its companion provision, 42 U.S.C. §1988,[5] is not limited to the situation in which the plaintiff prevails by a judgment in the Title VII action itself, by a favorable resolution of state administrative proceedings, or by a judgment in any other civil rights action. Rather, they have held that attorneys' fees are available whenever a civil rights cause of action ultimately results in the plaintiff's having obtained relief, even when there are several links in the chain of events connecting the claim brought and the relief granted. In *Maher v. Gagne*, 448 U.S. 122 (1980), for example, the Supreme Court upheld an award of attorneys' fees under section 1988 where the plaintiff's case was settled by a consent decree that gave the plaintiff substantially all the relief she had sought in her complaint. The Court stated:

> The fact that respondent prevailed through a settlement rather than through litigation does not

---

the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority,' a prevailing plaintiff 'ordinarily is to be awarded attorney's fees in all but special circumstances' " (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1978)).

[5] The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, which is worded identically to section 706(k), provides:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . , the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Since §1988 is similar in purpose and design to §706(k) of Title VII, *see* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5912; *Carey, supra*, 447 U.S. at 70 n. 9, cases interpreting §1988 can be applied to §706(k) as well.

> weaken her claim to fees. Nothing in the language of §1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated.

Id. at 129.

This court has declared that "[w]hether [a plaintiff] is entitled to a fees award should be determined by whether her case acted as a 'catalyst' for the vindication of her constitutional rights." *Staten v. Housing Auth.*, 638 F.2d 599, 605 (3d Cir. 1980). Our decisions have made it clear that a plaintiff can receive attorneys' fees even if the causal link between the civil rights suit and the relief obtained is not as direct as when the case is completely adjudicated in the district court itself or formally settled with the defendants in the context of the civil rights proceeding.

In *Ross v. Horn*, 598 F.2d 1312 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980), the plaintiffs filed suit in district court challenging New Jersey's procedure for handling suspected fraud in unemployment benefits. After the suit was filed, New Jersey made changes in its benefit processing system that cured the alleged faults in the system. This action then led to judgment being entered against the plaintiffs. Nevertheless, this court ruled that the plaintiffs might still be entitled to attorneys' fees:

> [W]e refuse to give conclusive weight to the form of the judgment. In assessing who is a prevailing party, we look to the substance of the litigation's outcome. If the new procedures, which provided much of the relief appellants had initially sought, were implemented *as a result of this lawsuit*, the appellants were prevailing parties with respect to a portion of their

> claims (which claims were thereby effectively mooted) irrespective of the judgment entered against them on the balance of their claims.

Id. at 1322 (emphasis added; footnote omitted).

Similarly, in *Morrison v. Ayoob*, 627 F.2d 669 (3d Cir. 1980) (per curiam), *cert. denied*, 101 S.Ct. 898 (1981), the plaintiffs' complaint that certain Pennsylvania county district justices were violating criminal defendants' right to counsel was mooted when the justices stopped violating that right after the suit was filed. The district court's finding that the suit was a "material factor" in bringing about the relief sought was upheld on the basis of the connection between the institution of the suit and the cessation of the justices' activity. In doing so, this court observed that the challenged activity terminated only after the plaintiffs' action had been filed and counsel for both sides had conferred.[6] In discussing the question of attorneys' fees under section 1988, the court stated:

> In this circuit, the test of whether a person is a prevailing party is whether he 'essentially succeeds in obtaining the relief he seeks in his claims on the merits.' *Bagby v. Beal*, 606 F.2d 411, 415 (3d Cir. 1979).
>
> * * *
>
> Defendants contend, however, that the cause of their cessation of conduct was not the filing of this

[6] The district court concluded that the suit was a "material factor" in bringing about the relief even though the defendants' conduct might also have been influenced by a letter from the President Judge of the County Court of Common Pleas and an appellate ruling of that court, both of which might have had no connection with the plaintiffs' action. 627 F.2d at 671-72.

> action. It is true that there must be a causal relationship between the action and the ultimate relief received for a person to be a prevailing party under §1988. . . . Nevertheless, the action need not be the sole cause. Where there is more than one cause, the plaintiff is a prevailing party if the action was a *material factor in bringing about the defendant's action.* To hold otherwise would be inconsistent with the broad remedial purpose of §1988 because in many cases causation will hinge on the defendant's motivation. To require some stricter standard of causation would mean that the defendant could hide his true motivation behind what seems a plausible alternate justification.

Id. at 671 (emphasis added; citation omitted).

The courts of appeals in other circuits have likewise adopted an expansive view of the causal link that must exist between the Title VII suit and the relief ultimately obtained. In *Criterion Club v. Board of Commissioners,* 594 F.2d 118 (5th Cir. 1979) (per curiam), the plaintiffs brought a class action on behalf of the black residents of Dougherty County, Georgia, against that county's Board of Commissioners, alleging that the county-wide, at-large system of electing the Board abridged their fourteenth and fifteenth amendment rights. The case never proceeded to trial. Instead, the parties reached an agreement pursuant to which the Dougherty County legislative delegation introduced a bill in the Georgia General Assembly redistricting the county and providing the opportunity for the election of at least two blacks to the County Commission. The bill passed and was signed by the Governor. The district court denied the plaintiffs' application for section 1988 attorneys' fees. The Fifth Circuit remanded the case to the dis-

trict court with the direction that if the district court found that the legislative changes that occurred were a consequence of the filing of the plaintiffs' suit by way of a compromise or other agreement of the parties, then attorneys' fees should be awarded. *Id.* at 120.

In numerous other cases, even though the plaintiffs obtained no formal judicial relief, "[attorneys'] fees were deemed appropriate because plaintiffs' lawsuits were catalysts motivating defendants to provide the primary relief sought." *Robinson v. Kimbrough,* No. 78-2237, at 9887 (5th Cir. Aug. 3, 1981). *See, e.g., id.* at 9888 n. 10 (citing cases); *Harrington v. DeVito,* 656 F.2d 264, 266 (7th Cir. 1981); *Young v. Kenley,* 641 F.2d 192, 195 (4th Cir. 1981); *Gurule v. Wilson,* 635 F.2d 782, 791 (10th Cir. 1980), *clarified per curiam on rehearing,* 649 F.2d 754 (10th Cir. 1981); *Smith v. University of N.C.,* 632 F.2d 316, 347 (4th Cir. 1980); *Chicano Police Officer's Ass'n v. Stover,* 624 F.2d 127, 131 (10th Cir. 1980); *United Handicapped Fed'n v. Andre,* 622 F.2d 342, 345-47 (8th Cir. 1980); *Nadeau v. Helgemoe,* 581 F.2d 275, 279-81 (1st Cir. 1978).

Thus, decisions of this court, even without regard to rulings of other courts of appeals, have never held that a plaintiff, in order to be entitled to attorneys' fees, had to be the prevailing judgment-winner in the district court itself. Rather, we have articulated a causal-connection standard whose central inquiry has been variously stated as whether the plaintiff obtained the relief sought "as a result of" the civil rights judicial efforts, *Ross, supra,* 598 F.2d at 1322, or whether these efforts were a "material factor" in obtaining the relief, *Morrison, supra,* 627 F.2d at 671. Accordingly, we would be departing from the spirit of principles which we have previously announced if

we were to hold that attorneys' fees may not be awarded when a Title VII plaintiff obtains the relief sought through arbitration, rather than through settlement, administrative action, or other change in the defendants' conduct, even though there exists a causal link between the Title VII litigation and the relief obtained. Our decisions have given expression and effect to the congressional intent that "for purposes of the award of counsel fees [under section 1988], parties may be considered to have prevailed when they vindicate rights through a consent judgment or *without formally obtaining relief.*" S. Rep. No. 94-1011, 94th Cong. 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5912 (emphasis added).[7]

It should not be surprising that this court's rulings have construed section 1988 to be operative when a causal connection between the action filed and the relief obtained is found. Even prior to the enactment of section 1988, this court had presaged a *Sullivan*-type situation, albeit in a non-civil rights context, and had ordered attorneys' fees to be paid to plaintiffs even though it was in a collateral proceeding that the plaintiffs had prevailed. *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970). Indeed, the Senate Report accompanying section 1988 cited *Thomas* as an example of the type of case in which attorneys' fees were to be awarded.

In *Thomas*, a committee of mine workers, beneficiaries of a union pension fund, sued their union on the ground that the union had failed to pursue mine operators that were delinquent in making contractually required pay-

---

[7] Since §1988 is similar in purpose and design to §706(k), *see* note 5 *supra*, these observations are equally applicable to attorneys' fees under Title VII.

ments into the pension fund. The court noted that although the suit itself did not result in the workers' gaining relief, it "was instrumental in prodding the cautious [union fund] trustees into more aggressive action" against the delinquent mine operators; as a result of the workers' suit, the fund filed a complaint against Honeybrook Mines and ultimately succeeded in recovering the overdue payments. *Id.* at 984. On these facts, this court held that because the workers' suits forced the union fund trustees to commence actions against the mine operators which resulted in recovery of overdue payments, the workers' counsel fees and expenses incurred in bringing about the trustees' actions were properly payable out of the recovered payments. *Id.* at 985.

The situation in *Thomas,* where, as we have observed, it was the employees' lawsuit against the union that caused the union in turn to sue and recover from the employers, is analogous to the situation here, even though *Thomas* was not a civil rights action. In this case, Sullivan's Title VII lawsuit prodded her union to take her case to arbitration against her employer, where relief was ultimately granted. The Senate Report's citation to, and approved of, *Thomas* as an example of a case in which it was appropriate to award attorneys' fees, indicates that congressional intent would be served by considering a party to have prevailed in a civil rights action even though relief ultimately was obtained in the context of a separate proceeding.

BVR's position, adopted by the district court, is that although Sullivan may have prevailed in her collective bargaining arbitration, she was not a prevailing party in an "action or proceeding under" Title VII, inasmuch as an arbitration is not an "action or proceeding under" that title. *See* 504 F. Supp. at 585. Thus, BVR claims, and the dis-

trict court held, that the literal requirements of section 706 (k) had not been met.

But, as we have previously pointed out, Congress and the courts have not given the language of section 706 (k) the narrow interpretation espoused by the defendants. As we have discussed, the Senate Report accompanying section 1988 made clear that "parties *may be considered to have prevailed* when they vindicate rights . . . without formally obtaining relief." S. Rep. No. 94-1011, *supra,* at 5, [1976] U.S. Code Cong. & Ad. News at 5912 (emphasis added). Consistent with that expression of intent, the cases that we have discussed above have refused to limit the concept of a prevailing party to parties who actually and literally prevail in the Ttile VII action or proceeding itself. Those decisions stand for the proposition that the crucial question under sections 706 (k) and 1988 is not whether a plaintiff *actually* prevailed in a Title VII or civil rights lawsuit, but whether the plaintiff may be *deemed* to have prevailed in the civil rights action because of the causal connection between the suit filed and the relief obtained.

Thus, in *Ross, supra,* the plaintiffs were deemed prevailing parties *in their civil rights action* concerning the administration of state unemployment benefits even though their relief was obtained through administrative changes which occurred outside the court proceedings and which were made after the initiation of the lawsuit. Similarly, in *Morrison, supra,* the federal court action the plaintiffs had brought challenging the practice of the county district justices was dismissed as moot because after the complaint had been filed the justices changed their practice to accord indigent defendants a right to counsel. Nevertheless, attorneys' fees were awarded the plaintiffs as "prevailing par-

ties" within the meaning of section 1988. *Criterion Club, supra,* a decision of the Fifth Circuit, is even more far-reaching. There, the court decreed that the plaintiffs should be deemed to be prevailing parties and thus entitled to attorneys' fees if the district court on remand found that a causal connection existed between the legislative changes that were enacted by the Georgia legislature and the suit brought by the plaintiffs.

Thus, BVR's argument that the Sullivan arbitration was not an "action or proceeding under" Title VII misses the point. Sullivan is not seeking attorneys' fees on the ground that she prevailed in the arbitration, but on the ground that by so prevailing, she may be *deemed* to have prevailed in her Title VII *lawsuit* because of its impact on, and material contribution to, the ultimate relief she obtained.[8]

---

[8] This point is underscored by the fact that Sullivan seeks no attorneys' fees in connection with those activities associated with the arbitration *per se,* where those activities were not related to Title VII issues.

We reject BVR's argument that for attorneys' fees to be available under a "catalyst theory," "the relief sought and obtained must affect a class or a large section of the public, no[t] merely the individual plaintiff bringing the suit." Appellees' Brief at 19. There is no support in the statute, legislative history, or cases for such a requirement. Section 706(k) expressly applies to "*any* action or proceeding under [Title VII]" (emphasis added). *Cf.* Maine v. Thiboutot, 448 U.S. 1, 9 (1980) (under §1988, "[attorneys'] fees are available in *any* §1983 action"). As the Second Circuit observed in Zarcone v. Perry, 581 F.2d 1039, 1042 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979):

> [Section 1988's] legislative history is clear that in authorizing awards of attorneys' fees to plaintiffs in civil rights actions Congress was concerned with enforcement not only of the civil rights of the public at large and of identifiable

III.

Here, the determination that Sullivan's lawsuit was a material factor in bringing about her success in the arbitration is not contested. The record shows that before the EEOC made its determination favorable to Sullivan, the union was uncertain as to the merits of her grievance, and had ceased acting on it for a full year pending the outcome of the EEOC proceedings. App. at 16. The EEOC's decision encouraged the union to bring Sullivan's case to arbitration. *Id.* at 17. The union's presentation of Sullivan's

---

> groups but also with the rights of individual plaintiffs. Its goal was to remove financial impediments that might preclude or hinder "private citizens," collectively or individually, from being "able to assert their civil rights" [quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5910]. . . . We therefore reject the view that, to be eligible for shifting of attorneys' fees, the civil rights plaintiff is obligated to show that his action resulted in direct benefits to others, rather than in benefits solely to himself.

Accord, Milwe v. Cavuoto, 653 F.2d 80, 83 (2d Cir. 1981); Perez v. University of P.R., 600 F.2d 1, 2 (1st Cir. 1979). *See also* Comment, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976,* 47 U. Chi. L. Rev. 332, 343 (1980) ("Congress intended that fees be recoverable in all suits brought under the statutes listed in section 1988—not because of the number of persons affected, but because of the nature of the substantive rights they protect"). We are not persuaded that we should depart from these principles when the "catalyst theory" is invoked. The mere fact that many cases applying the "catalyst theory" have involved broad-based relief does not mean that such broad relief is a requisite for application of the theory. *Cf.* Gibbs v. Town of Frisco City, Alabama Police Dep't, 626 F.2d 1218, 1221 (5th Cir. 1980) ("This court . . . has warned against distinguishing for §1988 purposes among cases depending on the category of the right vindicated.").

case at the arbitration was largely based on the information developed by Sullivan's retained counsel during the EEOC and discovery phases of Sullivan's Title VII action. 504 F. Supp. at 583.[9] The record, therefore, is sufficient to establish the necessary causal link between the efforts of Sullivan's counsel in the Title VII proceedings and the successful resolution of Sullivan's claim. We are satisfied that if attorneys' fees compensating counsel for Title VII activities are to be awarded when Title VII rights are vindicated after a full trial in the district court, such fees for the same activities should similarly be awarded when Title VII rights are vindicated through other means, such as, in this case, arbitration.[10]

IV.

We view our holding in this case as no more than a straightforward application of the principles set forth by the Supreme Court in *Maher, supra,* and by this court in

---

[9] The parties before this court do not dispute the fact that the efforts of Sullivan's retained counsel in the Title VII action were responsible for Sullivan's success in her arbitration. Rather, BVR contends only that these efforts are not legally compensable under §706(k). Because BVR does not contest the fact of causal connection, we see little purpose in remanding this case for formal findings as to causal nexus.

[10] We recognize that the district court relied on Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), in concluding that attorneys' fees could not be awarded to Sullivan. However, *Alexander* holds no more than that Title VII rights may be enforced in federal court without regard to the availability of a remedy under a collective bargaining agreement. *Alexander* does not speak to the issue that we have discussed and resolved here; *i.e.*, the availability of §706(k) and §1988 attorneys' fees where there is a causal nexus between the result obtained by the plaintiff and the civil rights lawsuit.

Ross, supra, and *Morrison, supra.* Thus, we hold that to qualify for an award of attorneys' fees under section 706 (k) for work done by counsel in connection with proceedings before the EEOC and in Ttile VII litigation in federal court, a plaintiff must satisfy two requirements. First, the plaintiff must be a "prevailing party"; *i.e.,* the plaintiff must essentially succeed in obtaining the relief sought on the merits. Second, the circumstances under which the plaintiff obtained the relief sought must be causally linked to the prosecution of the Title VII complaint, in the sense that the Title VII proceedings constituted a material contributing factor in bringing about the events that resulted in the obtaining of the desired relief.

We do *not* hold that a plaintiff may be awarded attorneys' fees in a Title VII case merely because, without more, the plaintiff succeeded in obtaining relief in a contemporaneous arbitration proceeding. Nor do we hold that attorneys' fees are available where there is merely incidental consultation or collaboration between the attorney in charge of the Title VII case and the attorney in charge of the arbitration.

Accordingly, we will vacate the district court's orders which denied plaintiff's motion for partial summary judgment as to her entitlement to attorneys' fees and which dismissed her complaint, and we will remand the case for the determination of a reasonable attorney's fee under section 706 (k) of Ttile VII.

ADAMS, J., dissenting.

I am not unsympathetic with the argument of the appellant, whose pursuit of her Title VII rights contributed to her eventual success at arbitration, but who, until now, was denied an award of attorneys' fees. Nonetheless, I am constrained both by the language of §706(k) and by the Supreme Court's recent decision in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), to dissent.

Section 706(k) provides that attorneys' fees may be awarded to the "prevailing party" in "any action or proceeding under" Title VII. In this circuit, the plaintiff[1] is deemed to have prevailed if he or she "essentially succeeds in obtaining the relief" sought on the merits. *Bagby v. Beal*, 606 F.2d 411, 415 (3d Cir. 1979). Here, no one questions that Sullivan received the relief she was seeking. The obstacle she faces in this appeal—and which, I maintain, she fails to hurdle—is the fact that the relief was granted not in an action or proceeding under Title VII but rather in an arbitration proceeding conducted pursuant to a collective bargaining agreement, not pursuant to the statute.

The district court relied on *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), in holding that, because the arbitration proceeding was not an action or proceeding under Title VII, Sullivan was not entitled to an attorney's fee award. In *Gaslight Club*, the Supreme Court concluded

---

[1] This discussion does not address the question whether a prevailing defendant is entitled to attorney's fees in a case as the one at hand. *See* Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978).

that state proceedings "to which the complainant was referred *pursuant to the provisions of Title VII*" were "proceedings" under that title for purposes of §706(k). 447 U.S. at 71 (emphasis added). The district court viewed *Gaslight Club* as controlling, declaring that

> the reason that *Gaslight Club* is an authority adverse, rather than favorable, to Sullivan is that Mr. Justice Blackmun's opinion for the Court places great emphasis on the fact that the New York administrative and judicial proceedings were—not just functionally, but formally as well—*an integral part of vindication of the Title VII claim.* As Mr. Justice Blackmun's opinion carefully explains, Title VII requires exhaustion of state anti-discrimination mechanisms as a predicate to the pursuit of federal enforcement mechanisms where the state processes are deemed adequate to vindicate Title VII's objectives. . . . Since New York's anti-discrimination mechanisms meet federal standards, *New York's administrative/judicial adjudicatory process is part and parcel of an "action or proceeding" under Title VII.*

504 F. Supp. at 584 (emphasis added).

On appeal, Sullivan makes no claim that the arbitration proceeding here was "part and parcel of an 'action or proceeding' under Title VII." She concedes that the arbitration was not "an integral part of vindication of the Titile VII claim," but argues, instead, that "her work on the federal case . . . brought about the successful arbitration." Because of this, she argues, "she is the prevailing party in her [Title VII] lawsuit." Brief of Appellant at 8. According to Sullivan, the district court was engaged in the wrong inquiry: "The court did not ask whether work in the fed-

eral case produced positive results elsewhere; instead it asked only whether the proceedings elsewhere can be deemed to be included in the federal action for fee award purposes." Such an inquiry, she asserts, was irrelevant.

The majority accepts this contention by Sullivan. In so doing it relies on a line of cases, unrelated to *Gaslight Club*, which hold, in effect, that if the plaintiff's Title VII lawsuit is a catalyst in achieving her objective she is a "prevailing party" for purposes of §706 (k) whether or not the Title VII action proceeded to judgment. *E.g., Morrison v. Ayoob*, 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 101 S.Ct. 898 (1981); *Ross v. Horn*, 598 F.2d 1312 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980). *See also Robinson v. Kimbrough*, 620 F.2d 468 (5th Cir. 1980); *Criterion Club of Albany v. Commissioners of Dougherty County*, 594 F.2d 118 (5th Cir. 1979).

Unfortunately for the plaintiff, none of the "catalyst" cases are dispositive in the present proceeding. On the whole, they address the situation in which the plaintiff's suit *itself* motivates the defendants voluntarily to change their conduct. In *Morrison v. Ayoob, supra*, for example, the plaintiffs filed suit alleging that the district justices of Beaver County, Pennsylvania, had violated the right-to-counsel rule of *Argersinger v. Hamlin*, 407 U.S. 25 (1972). While the action was pending, the defendants voluntarily began to comply with *Argersinger*. The court held that because the suit filed by the plaintiff was a material factor in bringing about the change in the defendant's conduct, the plaintiff could be deemed the "prevailing party." 627 F.2d at 671. Similarly, in *Ross v. Horn, supra*, this Court concluded that the chronology of events strongly suggested a causal relationship between the case at bar challenging the procedures used by the New Jersey Department of

Labor and Industry to prevent fraud in the receipt of unemployment benefits and the new procedures voluntarily adopted by the Department which effectively mooted the claims in the case. Judge Higginbotham, for a unanimous panel, stated that "[i]n assessing who is a prevailing party, we look to the substance of the outcome. If the new procedure, which provided much of the relief appellants had initially sought, were implemented *as a result of this lawsuit,* the appellants were prevailing parties. . . ." 598 F.2d at 1322. Other circuits have announced a similar formulation. *See e.g., Robinson v. Kimbrough, supra* at 476 ("plaintiffs may recover attorneys' fees if their lawsuit is a substantial factor or a significant catalyst *in motivating the defendants* to end their unconstitutional behavior") (emphasis added).

It is important to emphasize the rationale underlying *Mitchell, Ross,* and the other "catalyst" cases. In such situations, the defendants, faced with the prospect of Title VII litigation, have three choices: they can litigate, risking an unfavorable judgment; they can accede to a consent decree; or they can spontaneously modify their conduct so as to moot the lawsuit. Clearly, if the parties choose to litigate, attorney's fees are available, under §706(k), to the prevailing party. A similar result ensues if the parties negotiate a settlement in which the plaintiff receives the relief he or she seeks. *See Maher v. Gagne,* 448 U.S. 122 (1980). *Mitchell* and *Ross* merely applied §706(k) to the situation in which the defendants choose not to litigate or to settle the lawsuit, but voluntarily decide, in response to the lawsuit, to alter their discriminatory behavior. The cases are thus consistent with the expression of congressional intent found in the legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976, S. Rep. No.

94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5912: "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief*" (emphasis added). As Congress recognized, the plaintiff's institution of a lawsuit can evoke several responses from his or her adversary; as long as the plaintiff obtains the relief sought *as a result of the lawsuit,* no specific form of relief is required.

In Sullivan's case, in contrast, the plaintiff obtained relief, not in her Title VII action, but in a separate, formal arbitration proceeding. The Title VII lawsuit did not motivate the employer voluntarily to change its employment practices; apparently, the employer was willing to litigate the claim. If anything, Sullivan's federal claim motivated the *union*—not the employer—to take action and to press Sullivan's grievance at arbitration. It was the favorable arbitration award, not the filing of the Title VII lawsuit, that compelled the employer to change its conduct.

While there may be a causal link here, in my view it is simply too attenuated to warrant a holding, by this Court, that Sullivan prevailed in an "action or proceeding under [Title VII]." It must be stressed that §706 (k) is an *exception* to the general "American" rule that each party pay its own attorney's fee. *See Alyeska Pipleline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). Thus, though we may construe this civil rights statute broadly, we are limited by its terms: *"In any action or proceeding under [Title VII]* the court . . . may allow the prevailing party . . . a reasonable attorney's fee. . . ." As *Gaslight Club* made clear—and as Sullivan concedes—the arbitration

proceeding under which Sullivan prevailed is not an "action or proceeding" under Title VII. Nonetheless, the majority today holds that a plaintiff who pursues her rights under both Title VII and her union contract, and who prevails under the latter, is entitled to a counsel fee under §706 (k) of Title VII if the Title VII lawsuit "encourages" the union to fulfill its duty to represent fairly its aggrieved member, and if the union uses the work product of plaintiff's Title VII counsel in successfully pursuing plaintiff's contract claim. In stretching §706 (k) to accommodate this scenario, the majority has, I fear, twisted both the language of the statute and Congress' stated intent in enacting the fee-shifting provision of Title VII.

I am not unmindful of what might appear to be unfairness in not awarding plaintiff an attorney's fee. Sullivan's counsel obviously performed valuable services that should not go unrecognized. Nor will they; Sullivan, who obtained the relief she sought in the arbitration, should—like most parties subject to the American rule—pay for her own counsel's efforts. Nor am I unaware of the fact that, under the ruling proposed here, counsel in future Title VII cases may hesitate to provide assistance to unions concurrently processing grievances through arbitration. But the result advocated by the majority is fraught with an even more disturbing implication: the burgeoning of unnecessary litigation in the federal courts. Because of today's ruling, employees aggrieved by discriminatory practices may well file Title VII claims as an adjunct to already-initiated arbitration proceedings simply to ensure the eventual award of a counsel fee.

The Supreme Court has admonished us several times in the last several years to use the specific language in statutes enacted by the Congress when such language is, as

here, clear on its face.[2] And in *Alyeska Pipeline, supra,* the Court expressly declared that it is the responsibility of Congress, not of the courts, to expand the availability of attorney's fee awards. From my perspective, the majority today has not simply interpreted a statute; it has rewritten the law.

Accordingly, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

---

[2] *See, e.g.,* United States v. Rutherford, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. *See Anderson v. Wilson,* 289 U.S. 20, 27 (1933). Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied. *See TVA v. Hill,* [437 U.S. 153, 187 (1978)].").

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1250

SULLIVAN, Anna,

Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, BUREAU OF VOCATIONAL REHABILITATION; BONNER, James, Assistant Director, Field Operations; RENZI, Anthony, Regional Administrator; NOLAN, John, District Administrator

(D.C. Civil No. 78-3927)

On Appeal From the United States District Court for the Eastern District of Pennsylvania

Present: SEITZ, Chief Judge and ADAMS and GARTH, Circuit Judges

---

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on September 17, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court entered December 26, 1980 and January 7, 1981, be, and the same are hereby vacated and the cause remanded for the determination of a reasonable attorney's fee under Section 706 (k) of Title VII, in accordance with the opinion of this Court.

ATTEST:
(s) Sally Mrvos
Clerk

October 26, 1981

Certified as a true copy and issued in lieu of a formal mandate on November 17, 1981.

Test:
Clerk, United States Court of Appeals
for the Third Circuit

Opposition

81-1384

No.

Office - Supreme Court, U.S.
FILED
FEB 24 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1981

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY, BUREAU OF VOCATIONAL REHABILITATION; JAMES BONNER, Assistant Director, Field Operations; ANTHONY RENZI, Regional Administrator; and JOHN NOLAN, District Administrator,

Petitioners,

vs.

ANNA SULLIVAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ALICE W. BALLARD
SAMUEL, BALLARD & HYMAN
Attorneys for Respondent
4013 Chestnut Street
Philadelphia, Pennyslvania 19104
(215) 387-5535

6356 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

QUESTION PRESENTED FOR REVIEW

Respondent alleged unlawful employment discrimination, and contemporaneously pursued both her contractual and statutory remedies. Where her counsel's efforts in prosecuting her Title VII suit were a material factor in her ultimately obtaining the relief she sought through arbitration, did the Court of Appeals err in awarding fees for the Title VII efforts of her counsel?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

Reasons for Denying the Writ:

I. This is not a case of great potential impact. 4

II. The decision of the Court of Appeals is in harmony with applicable decisions of this Court. 7

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Alexander v. Gardner-Denver, 415 U.S. 36 (1974) 8, 9

Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) 8

General Telephone Co. of California and Communications Workers of America, 77 LA 1021 7

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 8

Contents

Page

Maher v. Gagne, 448 U.S. 122 (1980) 8

Mohasco Corp. v. Silver, 100 S. Ct. 2486 (1980) 5

Statute Cited:

42 U.S.C. §1983 2

Other Authorities Cited:

29 C.F.R. §1601.28 6

Davis, Pearce & Pati, Gopal C. "Elapsed Time Patterns in Labor Grievance Arbitration; 1942-1972" 5

Federal Mediation and Conciliation Service 33rd Annual Report, Fiscal Year 1980, Table 20 5

S. Rep. No. 94-1011 [1976] U.S. Code Cong. and Ad. News at 59112 8

The Labor Arbitration Journal, 29:21, March 1974 5

No.

In The

Supreme Court of the United States

October Term, 1981

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR AND INDUSTRY, BUREAU OF VOCATIONAL REHABILITATION; JAMES BONNER, Assistant Director, Field Operations; ANTHONY RENZI, Regional Administrator; and JOHN NOLAN, District Administrator,

Petitioners,

vs.

ANNA SULLIVAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Anna Sullivan was a rehabilitation counselor for the Pennsylvania Department of Labor & Industry, Bureau of Vocational Rehabilitation ("BVR"). In March of 1977, she

competed for a promotion with a male co-worker whose qualifications seemed inferior to hers. When he was selected, she filed a grievance under the non-discrimination clause of her collective bargaining agreement. Two months later, she also filed a charge of sex discrimination with the EEOC, based on the same facts as her grievance.

Thereafter, Sullivan pursued her contractual and statutory remedies contemporaneously. During the spring of 1977, the union processed her grievance through the pre-arbitral steps without success. Suffering from a lack of discovery, however, the union was uncertain as to the real strength of Sullivan's grievance. When in July of 1977 it received the fourth step denial from BVR, the union ceased activity on the case, pending the outcome of the EEOC proceedings.

In the meantime, Sullivan's privately retained counsel spurred on the EEOC inquiry. Her counsel helped the EEOC to discover substantial pertinent information, which led the Commission to make a determination in Sullivan's favor.

The EEOC's decision served as a prod to the union to bring Sullivan's case to arbitration. In December of 1978 the union filed its arbitration demand, shortly after Sullivan had filed her complaint in this litigation under Title VII and 42 U.S.C. §1983. In discovery under the federal rules, Sullivan's counsel found additional records showing that Sullivan's performance evaluations had been superior to those of the male co-worker who was promoted ahead of her. Using these documents and the materials from Sullivan's EEOC file, counsel prepared a case outline detailing each of the elements in the case, along with the proof of the supporting facts.

Thereafter, Sullivan's counsel collaborated extensively with the union's attorney as he prepared for the arbitration hearing. Sullivan's counsel provided him with the documents she had discovered and her case outline, along with questions she had prepared for use in examining and cross-examining the witnesses at depositions. At the arbitration hearing, the union's attorney relied heavily on these materials, and he examined the witnesses directly from the questions that Sullivan's counsel had prepared.

In February of 1980, the arbitrator sustained the grievance, concluding that Sullivan had been denied a promotion on the basis of her sex, and ordering that she be retroactively promoted with back pay and associated benefits. After the union's petition to enforce the arbitral award was granted, Sullivan received all the relief she had sought in her Title VII suit, except for her attorney's fee.

Thereafter, Sullivan filed a motion for partial summary judgment, seeking fees for the work her counsel had performed on her Title VII case which had been a material factor in producing the positive result at arbitration. She did not seek fees for work her counsel had done solely on the arbitration, and which was not reasonably necessary in her federal civil action (17a, 26a).[1]

To support her motion, Sullivan introduced affidavits of her union representative, her union's attorney, and her own counsel, setting forth the facts described in this *Statement*. These facts were never challenged by the BVR, and they remain uncontested today on this record (16a). As found by the District Court and the Court of Appeals, the work by Sullivan's counsel on her civil

---

1. For example, Sullivan did not request fees for the time spent by her counsel while helping the union petition to enforce the arbitration award.

rights action contributed materially to the arbitration victory which mooted her case (2a, 13a, 16a, 26a, 28a).

The District Court denied Sullivan's request for fees solely on the theory that the arbitration was not an "action or proceeding under" Title VII within the meaning of §706(k), and hence attorney's fees under that section were not available (17a).

On appeal, the Third Circuit held the District Court in error, pointing out that since Sullivan was not seeking fees for work done in the arbitral forum, the place held by arbitration in the Title VII statutory scheme was beside the point (26a). The key issue, instead, was that Sullivan's Title VII case was a material factor in the vindication of her rights through other means (28a). In a "straightforward application of the principles set forth by the Supreme Court in *Maher* [*v. Gagne,* 448 U.S. 122 (1980)]" (28a), the Third Circuit held that the causal link between the prosecution of Sullivan's Title VII complaint and her victory at arbitration sufficed to entitle her to an award of attorney's fees under §706(k).

REASONS FOR DENYING THE WRIT

I.

This is not a case of great potential impact.

This case presents an unusual factual scenario of cooperation between a union attorney and civil rights counsel, both working for an individual aggrieved by employment discrimination.

The collaboration of the two lawyers was made possible by an uncommon set of circumstances, including the union's perception that it could not assess its case without further discovery which was unavailable; the willingness of the union to accept help

from outside counsel; the ability of the union to delay arbitration for over two and one-half years, pending discovery and other developments in the civil rights case; and the ability of civil rights counsel to discover the necessary information while the union waited for it.

This constellation of personalities, events, and inclinations does not promise to be a recurring one as petitioner suggests. On the contrary, respondent predicts that future recurrences of cases like this one will be as rare as they have been historically; *Sullivan* was a case of first impression on its facts.

The main reason why *Sullivan*-type cases will not flood the courts as petitioner suggests is that the usual timing of events simply will not permit it. Arbitration hearings are generally finished long before attorneys can get federal discovery sufficient to affect their outcome.

Studies have shown that on the average, arbitration hearings take place within seven months of the filing of a grievance.[2] By contrast, an EEOC charge may not even be filed until sixty days have elapsed from the offending action, because of the deferral requirement of §706 of Title VII. *Mohasco Corp. v. Silver,* 100 S. Ct. 2486 (1980). During the ensuing five months before the

---

2. *See, for example,* Federal Mediation and Conciliation Service 33rd Annual Report, Fiscal Year 1980, Table 20, which shows the Average Elapsed Time in Days for FMCS Closed Arbitration Award Cases Sampled in Fiscal Years 1970 through 1980. These data for labor arbitrations in private and public sector employment give average figures for the time from the filing of a grievance to the arbitral hearing at about seven months for each year sampled.

See also, Davis, Pearce & Pati, Gopal C. "Elapsed Time Patterns in Labor Grievance Arbitration; 1942-1972"; *The Labor Arbitration Journal,* 29:21, March 1974, which gives a comparable average figure of 7.3 months for recent years in the study.

arbitration hearing, a charging party would hardly be able to secure the representation of counsel, gain the benefits of an EEOC investigation, obtain a right-to-sue letter (this alone takes 180 days under 29 C.F.R. §1601.28), file a civil action, and get substantive responses to the first round of discovery for submission at the arbitration hearing. In the vast majority of cases, time alone will preclude the possibility of the *Sullivan* strategy working again.

Beyond timing problems, there is a second reason why cases like this one will be rare: they require a genuine working relationship between the union (which may well be a defendant in the Title VII action) and civil rights counsel who is otherwise an interloper in the grievance-arbitration process. "[I]ncidental consultation and collaboration" between counsel and the union is not enough (29a), and unions are not naturally inclined to go along with more than that if it means delay and submission to an outsider's theory of the case.

In short, *Sullivan* is the exception rather than the rule where union/private counsel interactions are concerned.

Petitioner also argues that employers will bargain against anti-discrimination clauses in labor contracts if they know there is a risk of an attorney's fee assessment against them in connection with arbitration of discrimination grievances. This argument, however, is a self-serving one, which can only be made by an employer which refuses to give a union the discovery it needs to assess an arbitration grievance. Employers can easily obviate any union need for the assistance of civil rights counsel simply by yielding the information that the union was unable to obtain in *Sullivan,* and that outside counsel obtained in her civil rights action: *i.e.,* the criteria upon which the promotion decision was

based (14a), and the performance of the grievant and the promoted male as measured against those criteria (15a)[3].

Thus, when the employer is willing to yield its unfair advantage over the union in discrimination cases, it will have insulated itself from any risk of an adverse fee award like the one in the instant case.

II.

The decision of the Court of Appeals is in harmony with applicable decisions of this Court.

The decision of the Court of Appeals stands for the following summary propositions:

— First, the Title VII lawsuit and the labor arbitration were entirely separate proceedings (24a-26a);

— The facts established a causai link between the efforts of Sullivan's counsel in the Title VII proceedings and the successful resolution of her claim at arbitration (28a);

— Third, because of that causal link, and not because of any other relationship between a federal civil action and a labor arbitration, Sullivan may be considered to have prevailed in her Title VII action in the sense contemplated

---

3. *Cf., General Telephone Co. of California and Communications Workers of America,* 77 LA 1021, a recent arbitration decision in which the arbitrator held that without access to data on the terms and conditions of employment of pregnant workers on the company's payroll, the union would not be able to monitor the non-discrimination provisions of its collective bargaining agreement, and therefore would be unable to fulfill its responsibility to represent all bargaining unit members equally.

by Congress in S. Rep. No. 94-1011 [1976] U.S. Code Cong. and Ad. News at 59112, and by the Supreme Court in *Maher v. Gagne,* 448 U.S. 122 (1980).

Contrary to the assertions of petitioners, these three principles are not in conflict with the cases of this Court which note the independence of statutory and contractual remedies in discrimination cases. The concept of independence implies that there will be no legal implications of the discriminatee's choice to pursue one or both remedies [*e.g.,* filing of a grievance pursuant to a collective bargaining agreement does not toll the statute of limitations for filing a charge with the EEOC. *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976). Title VII court need not defer to the decision of an arbitrator. *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974)]. The concept of independence, however, recognizes that independent remedies will have practical effects on each other, as the Supreme Court acknowledged in *Electrical Workers v. Robbins & Myers, Inc., supra,* at 237; and *Johnson v. Railway Express Agency,* 421 U.S. 454, 465-466 (1975).

Petitioners seek to convert the notion of legal independence into one of practical independence, arguing that this Court should nullify any practical causal relationship between a Title VII action and a labor arbitration by carving out an exception to the existing doctrine of awarding fees to civil rights plaintiffs who have prevailed without formally obtaining relief. There is no basis in any existing Supreme Court law for following the route that petitioners suggest.

In fact, the Supreme Court has already elaborated on the idea that legally independent remedies may have practical effects on each other when both are pursued. For example, it noted in *Alexander v. Gardner-Denver Company, supra,* that the arbitral decision may be admitted into evidence in a federal civil rights

action and accorded such weight as the court deems appropriate. 415 U.S. at 60 and note 21 (1974). Commenting on the practical effect that the arbitration award might have on the civil rights proceedings, the opinion states:

> "We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But the courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of the courts to assure the full availability of this forum." 415 U.S. at 60, note 21.

Had the Supreme Court adopted the argument put forth by petitioners in this case, *i.e.*, that there can be no practical interaction between the two remedies available to the discriminatee, it would have decided *Alexander v. Gardner-Denver* differently. It would have held that the arbitration award is inadmissible in

the federal civil action, and could have no effect whatsoever on the decision of the District Court.

The law, however, is to the contrary, and the relationship between the two remedies cannot be denied. The Third Circuit's decision in *Sullivan* is simply another facet of the practical relationship between the two routes available to the discriminatee.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

ALICE W. BALLARD
Attorney for Respondent